IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

Nos. ~~758, 759~~ 25.26

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

VIRGINIA ELECTRIC AND POWER COMPANY.

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

THE INDEPENDENT ORGANIZATION OF EMPLOYEES OF THE VIRGINIA ELECTRIC AND POWER COMPANY

BRIEF FOR RESPONDENT VIRGINIA ELECTRIC AND POWER COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

VIRGINIA ELECTRIC AND POWER COMPANY,

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Table of Contents

Table of Cases Cited

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Opinion Below

The opinion of the court below (the Circuit Court of Appeals for the Fourth Circuit) is reported in 115 Fed. (2d) 414. It is also contained in the Record (Pro. 23-36).

The Decision and Order of the Board (P. A. I, 1-45)[1] are reported in 20 N. L. R. B., No. 87.

Jurisdiction

The date of the opinion and of the decrees sought to be reviewed herein is November 12, 1940 (Pro. 23, 37).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Sections 10(e) and (f) of the National Labor Relations Act (herein called the Act).

Statement of the Case

A statement of the facts is, in view of the argumentative and incomplete presentation in the Petition, necessary to give the Court a fair statement of the issues involved. They may be briefly reviewed under the two headings of action by the Company and action by the employees:

1. Action by the Company

The Company is an electric utility in Virginia and North Carolina; it also, in Virginia, conducts a manufactured gas business and furnishes local transportation.

The early months of 1937 were, as shown by the record[2]

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[1] The abbreviations used in the Petition are used also here except that the Independent Union is referred to as the "I. O. E.," the designation used throughout the hearing and the Decision and Order. In addition: (1) R. A. designates the appendix to the Company's reply brief; (2) C. I. O. designates Congress of Industrial Organizations; and (3) I. B. E. W. designates International Brotherhood of Electrical Workers, an affiliate of the A. F. of L.

[2] P. A. I, 288-290, 370.

and as the Court will take judicial notice[3], a time of tension and unrest in matters of labor organization. Confusion was prevalent, intensified by extreme positions taken on each side in certain localities. There were indications from the employees of the Company that they would like to know their position and that of the Company. The management conceived, therefore, that it had a duty to clarify this general preoccupation by a distinct statement of Company policy[4]. This was accordingly done by posting the bulletin of April 26, 1937 (quoted in full at Pro. 26).

Indigenous as it was to its time, the bulletin began with an introductory reference to the historical occasion for the interest which prompted its publication. After that it made, essentially, three substantive statements:

> (1) "The Company recognizes the right of every employee to join any union that he may wish to join, and such membership will not affect his position with the Company."
>
> (2) ". . . it is not at all necessary for him to join any labor organization, despite anything he may be told to the contrary."
>
> (3) "If any of you, individually or as a group, at any time, have any matter which you wish to discuss with us, any officer or department head will be glad, as they always have been, to meet with you and discuss them frankly and fully."

To the surprise of the management there were received during the next few weeks petitions from substantial numbers of men at various points throughout the system indicat-

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[3] *Jefferson Electric Co.* v. *N. L. R. B.*, 1939, C. C. A. 7, 102 F. (2d) 949, 954.

[4] P. A. I, 78-79, 472, 500.

ing dissatisfaction with their wages and working conditions.[5] These included a request from many of the Norfolk transportation operators for a 50% wage increase and various requests from Richmond. Some of these could be granted, but the full wage request could not be. Satisfaction on the part of the employees is, however, an indispensable asset in a public service enterprise and it was essential that a state of satisfaction be restored. This seemed hardly possible while totally refusing the wage request; presumably there would have to be some threshing out of an intermediate decision that would give reasonable satisfaction to the men and fair recognition to the other factors involved. The trouble was that no mechanics were available for any such determination[6].

To determine a course of action all top supervisory officers were convened in consultation on May 20th[7]. They agreed that negotiation was apparently necessary and impending but that it would not be fair to consult with the fractional groups that had happened to petition without giving an opportunity to the other men to be heard and participate should they so desire. Only by such prior opportunity would there be any possibility of reaching a solution that could be expected to bring real satisfaction. The men of course were entitled to take such action as they might desire and only they could determine what they did desire. It was, therefore, determined to lay the whole problem before them and invite them to take such action, if any, as they might desire and to abide by the result, whatever it might be. This was to be done by an address, a method fol-

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[5] P. A. I. 56-57, 257-259, 344-345, 475-476.

[6] P. A. I. 475-476.

[7] P. A. I. 54-56, 259-264, 290-293, 345-346, 364-366. These references cover the conclusion of the meeting as well as its convention.

lowed by departments, from time to time, for other purposes. But for the whole system, a mass meeting was impracticable, since operations are continuous in time and scattered in space. The men were therefore invited by department heads to select smaller numbers from among them as sample audiences in Richmond and Norfolk.

To these audiences a written address was read on May 24th, by the Company president in Richmond and a vice president in Norfolk (quoted in full at Pro. 27-28). Essentially this was an effort by the Company

> "to make it perfectly clear that its policy is one of willingness to bargain with its employees in any manner satisfactory to the majority of its employees and that no employee will be discriminated against because of any labor affiliations he desires to make."[8]

In answer to questions, the officials stated that no one had to join any organization and refused to advise as to type of organization (P. A. I, 20 and Pro. 29). In two particulars the Richmond meeting differed from the Norfolk meeting. For one, the President added an oral summary of the written address, as follows: he

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[8] The Board, seeking partial emphasis by excerpts, looks largely to the last paragraph of the address and ironically emphasizes its position by the following textual change:

> "In view of your requests to bargain directly with the Company and in view of your right to self-organization as provided in the law, it will facilitate negotiations if you will proceed to set up your organization, select your own officers and adviser [changed to read *supervisors*], adopt your own bylaws and rules, and select your representatives to meet with the company officials whenever you desire."

> "explained to the employees that, in plain everyday English, that statement said that they had a right to do whatever they saw fit to do, and their actions must be determined by their own judgment; that neither the Company nor any of its officers or executives were to interfere with them in the slightest degree in arriving at a conclusion as to whether they wished collective bargaining with the Company, and if so, how they wished to carry out the collective bargaining" (P. A. I, 60).

The other difference was that to give the men, about 2500 in number and scattered through some 50 possible units in different communities, adequate opportunity for deliberate choice as to the decision they wished to make, the Company president said that if any wage increase should be made, as a result of collective bargaining or by the Company itself without any bargaining, it would begin one week from that date (P. A. I, 74-75 and 479-480). No such statement was made in Norfolk because the president's decision in that respect was not made until he advanced to the platform in the Richmond meeting.

In both meetings the officers then withdrew, leaving the men for discussion if they wished. The officers never knew, and made no attempt to learn, what happened after they left (P. A. I, 264 and 267).

Although absolute instructions were issued at the May 20th meeting, for transmission to all subordinate supervisors, that no person in any supervisory position should give any advice, influence, assistance or interference in respect of any organizational matter, the executives, fearing from the questions at the May 24th meeting that some employees might seek advice, caused similar instructions to be reiterated throughout the whole property on May 25th[9].

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[9] P. A. I, 267-269, 303-307, 349-350, 368-370, 501-502.

These instructions included prohibition of use of Company property for any organizational meeting or solicitation (P. A. I, 308-309). They were promptly transmitted to the subordinate supervisors and no complaint of any violation was ever brought to management until the Board's proceedings.[10]

For two months management was in ignorance of what, if anything, was being done in regard to any labor organization or organizations, except only for occasional and shifting rumors through the public press. It took, moreover, no further action of any kind, except in three incidents near the middle of June. On June 14th a Norfolk transportation operator orally requested separate bargaining with a part of the Norfolk transportation employees (apparently not then organized and certainly unaffiliated)[11] and on June 15th an employee committee asked for a list of names of employees[12]. On June 24th a newspaper reported the Norfolk operator whose bargaining request had been denied to have publicly claimed an offer from the Company for a fine job

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[10] P. A. I, 269, 307 370, 382-383, 427-428.

[11] This request was declined on the ground that, as stated in the May 24th address, the Company could not "in fairness to the Company or to the employees" deal with any such small group (P. A. I, 79, 267-271, 480-483, 493-494 and 496-497).

[12] The committee was designated as "Steering Committee for the Richmond Division for the proposed 'Independent Organization of Employees of The Virginia Electric & Power Co.'" (P. A. I, 308-309, 503-504 and P. A. II, 854-855, 858-859; Board Exhibit 39 and Board Exhibit 40-A). This list was supplied and the Company was paid for the cost of its preparation. The Company president testified that a similar list would have been given to any one requesting it in connection with any effort to organize the men, either to the A. F. of L. or the C. I. O. or any one else, but in fact no such request was received from any one else (P. A. I, 503-506).

elsewhere "to turn over his organization to the Company and leave Norfolk." This accusation, later shown to be false, was immediately denied by a bulletin posted all over the properties on the same day[13]. After denying the charge, this bulletin stated:

> "Employees of Virginia Electric and Power Company have a right to self-organization, to form, join or assist labor organizations and to bargain collectively through representatives of their own choosing, and the Company has not sought and does not seek to dominate or interfere with employees in the exercise of any of their rights, individually or collectively."

Some two months after the May 24th addresses, the Company president received a letter from the I. O. E. asserting representation of 89% of all non-supervisory employees and demanding prompt negotiation. On the statements of I. O. E. counsel (Resp. Ex. 13, P. A. II, 994-997) indicating that the organization was duly formed and accredited, a meeting was held, beginning on July 30th. At the outset the I. O. E. representatives produced for examination signed membership cards representing 90% of all non-supervisory employees[14]. Sharp differences of view were soon discovered and vigorously maintained, particularly the basic opposition of the Company to the closed shop provision and large wage increases, both of which were demanded by the I. O. E. In the course of almost continuous negotiations for three days and nights, the virility of which has not been questioned, a union agreement was negotiated

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[13] P. A. I, 154-155, 386-387, 422, 429-430, 483-484; Respondent's Exhibit 7, P. A. II, 993.

[14] P. A. II, 745-746.

and prepared[15]. Both of the two leading issues were compromised, the wage demands by an intermediate figure (about 60% of the initial request) and the closed shop clause by requiring all employees to join but providing that such membership should not affect their position with, or privilege to join, other unions. After reports and authorizations within the I. O. E., the agreement was signed on August 5th[16].

Immediately thereupon the I. O. E. established its grievance committees and began its vigilant and aggressive career, as to the effective independence of which no question has been made. The check-off required by the contract began on August 20th, when the Company delivered $3,-784.50 to the I. O. E. as deductions from wages, then earned although not in all cases then due.[17]

The above summarizes all of management knowledge as to any matter of labor organization on the properties of the Company from the enactment of the Act until the filing of the complaint in this case. The I. O. E., however, actively intervening in the proceeding, disclosed the whole process of its creation with scientific detail.

2. Organizational Activities Among the Employees

After the May 24th addresses some of the audiences in Richmond and Norfolk decided to report the speech to their fellow employees and "see what they wanted to do about it, whether they wanted to form an organization, or what kind of an organization they wanted to form . . ."[18] Some of

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[15] P. A. I, 66-69, 270-280, 311-332, 341-342, 356-359, 402-404, 415-417, 423, 495-496, 507-509; P. A. II, 695-706, 745-751, 853-854, 873, 904-905.

[16] P. A. I, 24; P. A. II, 704-705, 749-750.

[17] Board Exhibits 9, 26, 36, 53; P. A. II, 925, 949, 968, 992-993.

[18] P. A. II, 658 as to Norfolk (and *id.*, 657, 659, 720-722, 759 and 809); for Richmond see P. A. II, 840-841, 882, 892-895.

these report meetings were held on Company premises, in two cases (on the ground that a report only was intended) with permission by supervisory employees.[19] No knowledge of these occurrences, however, ever came to the executives, and no complaint was made.[20] In one instance alone a notice for such a report meeting was posted on one bulletin board.[21]

Between that time and June 15th many meetings of different groups of employees occurred, in which discussions were held and votes taken on the matter of organizational affiliation. Some minorities were disposed to the C. I. O. or the I. B. E. W., but the overwhelming majority in all groups proved to be in favor of an independent union.[22] Some of these meetings were on Company property,[23] others not;[24] so far as the record shows, all such meetings on Company property were without permission;[25] in several in-

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[19] P. A. II, 841-842, 893-894, and 898-899.

[20] P. A. I, 269, 370, 501-502.

[21] All Petitioner's references to bulletin boards concern this one notice alone (Pro. 34).

[22] Interv. Ex. 3; P. A. II, 659-662, 722-728, 779-780, 796, 820, 822-823, 831, 875-877, 882-885, 887-888; Resp. Ex. 11, Norfolk *Virginian-Pilot*, May 28, 1937; *id.*, May 29, 1937; Interv. Ex. 33; P. A. II, 1035-1036. Apparently this was the first general consideration among the men of organizing. Aside from inconsequential pamphleteering in Richmond (P. A. II, 896) earlier in the year, there had been no movement toward organization except a few Norfolk employees joining a C. I. O. affiliate in May (P. A. I, 13, 166, 180-181 and 239); there seems, however, to have been no actual C. I. O. organization until June when an organizer arrived and officers were elected (P. A. I, 123, 124, 150-152, 237, 238 and 239; see also P. A. I, 129 and 149). The I. B. E. W. appeared in Norfolk some time in June and the Amalgamated "late in 1937" (P. A. I, 13).

[23] P. A. I, 120; P. A. II, 770, 823-824, 946, 1003-1008, 1035-1043.

[24] P. A. II, 883, 885, 907, 910.

[25] P. A. II, 722-723, 753, 811-812, 815-816, 820, 824, 833-834, 917.

stances the "Company" properties so used were the men's own Y. M. C. A. or other recreational rooms.[26]

Norfolk and Richmond representatives conferred on June 3rd and agreed on the joint employment of William Earle White, as counsel to prepare organizational papers.[27] Mr. White has never had any connection with the Company. Mr. White advised the men not to meet on Company property.[28] In the next two weeks numerous meetings in various groups in Richmond and Norfolk were held to consider and revise the drafts of constitution and by-laws prepared by Mr. White and a joint committee from the two cities was constituted for the purpose of final formulation. The committee discharged its task in the American Legion Hall in Richmond on June 15th in the course of a protracted and active session.[29] Solicitation of membership began shortly thereafter, as soon as the printed membership cards became available. For the most part I. O. E. solicitation was not on Company property or time;[30] in some instances, however, it was; and at the same time organizers for the A. F. of L. and C. I. O. discussed and solicited for those unions on Company property.[31]

After nominations and elections of representatives, by secret ballot, off Company property and time, on July 2nd

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[26] P. A. II, 815-816; P. A. I, 122-123, 360-362.

[27] P. A. II, 768-769, 780, 789-791, 799-800, 810, 857-858, 868-869, 877-878.

[28] Such use was discontinued at once in Richmond and from June 15th in Norfolk, at which time Mr. White first had direct contact there. It was stipulated that no meeting has been held on Company property anywhere since June 15th (P. A. II, 908-909).

[29] Intervener's Ex. 22; P. A. II, 1026-1033; Board's Exhibits 26 and 36; P. A. II, 949, 950-968; P. A. I, 255; P. A. II, 771-773, 780-781, 847-851, 872, 884; Intervener's Exhibits 36, 37.

[30] P. A. II, 677, 775, 824-825, 834-835, 904; Resp. Ex. 13, P. A. II, 994-997.

[31] P. A. I, 174-175, 194-196; P. A. II, 754-756, 775-776, 792-794, 803-804, 827-830, 896; Intervener's Exhibit 21.

and July 12th, the new officials constituted the I. O. E. and undertook the formulation of its bargaining demands. After intensive canvas of their respective "voting sections" to ascertain the wishes of the men, all representatives met in plenary convention at a hotel at Ocean View, Virginia, on a July week-end to assemble all their various views into a coordinated series of proposals.[32] Those were ultimately put in the formal language of a proposed contract by Mr. White and after approval on the part of the I. O. E. this draft was then sent to the Company as the I. O. E. demand of July 19th above mentioned.

Questions Presented

The Petition presents only one basic question: whether the decision of the court below in so far as it set aside an order disestablishing the I. O. E. presents any matter of general importance in the administration of the Act, or in conflict with prior decisions of this Court, that deserves review. The Petition urges the affirmative of that question on the assertion that "conditions fairly attributable to the employer [particularly the text of the May 24th address] canalized the employees' choice in the direction of a particular labor organization" (Petition, p. 18) and that the court below refused to recognize subtlety as a violation of the Act, holding that only "a bald announcement" (*id.*) would contravene its provisions.

To this is added, but apparently only as a make-weight, a claim that the decision below in so far as it set aside a cease and desist order presents a matter of public importance, on the ground that there had been "anti-union threats and

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[32] Intervener's Exhibits 15, 29; P. A. II, *684-686, 694-695, 741-745, 782, 804-805, 886-887.*

surveillance of union meetings" (Petition, p. 4) by one minor supervisory employee.

The only other question is one not presented or considered in the court below, *i. e.*, whether, upon disestablishment, the Board may require reimbursement of dues theretofore deducted from wages pursuant to a union agreement and individual assignments.

Summary of Argument

1. The Decision Setting Aside the Disestablishment Order Does Not Present Any Question That Should Be Reviewed By This Court.

The May 24th address was only a presentation of the practical problem to the men which left them completely free to follow whatever their own wishes might be. In so holding (and in similarly holding with respect to the other circumstances urged in the Petition) the court did not confront or purport to decide any issue of novelty or importance in the administration of the Act. The decision is of no general applicability.

If the case presented any general rule, which it does not, that would be only that a disclosure of employer preference in terms guaranteeing complete freedom of organizational choice does not violate the Act. Such a rule is sound and consistent with all existing decisions but in any event the instant case is not a satisfactory vehicle for its review.

2. The Point of Interference Is Plainly Ineligible for Review

The alleged anti-union action of a minor supervisor was contrary to published executive policy and could not have been reasonably accepted as anything but an individual view. The court's judgment to that effect was made in ostensible

conformity to the principles of the Heinz Case[33] and the Link-Belt Case[34] and presents no issue meriting review.

3. The Point of Reimbursing Checked-off Dues Is Not Presented

The court below did not have to face this question and did not purport to face it or decide it. If the point is of public concern, the review opportunity exists in another case presenting the issue squarely.

Argument

1. The Decision Setting Aside the Disestablishment Order Does Not Present Any Question That Should Be Reviewed By This Court.

The court below was never informed by the Board that rejection of the order would have the sinister consequences now asserted in the Petition. Nor has the Board told the court even yet that the decision legalizes subtlety as a universal exemption from the Act. And if the Board had, as if by a petition for rehearing, that court would have been the first to reject such a caricature of its opinion.

On the contrary, the court below, one of the first to recognize the fact-finding prerogatives of the expert administrative agency,[35] made, consistently with those prerogatives, a patient survey of all the concrete circumstances of the

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[33] *H. J. Heinz Co.* v. *N. L. R. B.*, January 6, 1941, No. 73, this Term, 85 L. ed. 303.

[34] *N. L. R. B.* v. *Link-Belt Co.*, January 6, 1941, Nos. 235 and 236, this Term; 85 L. ed. 325.

[35] *Appalachian Electric Power Co.* v. *N. L. R. B.*, 1938, 93 F. (2d) 985, cited with approval in *Consolidated Edison Co.* v. *N. L. R. B.*, 1938, 305 U. S. 197, 229, and *N. L. R. B.* v. *Columbian Enameling & Stamping Co.*, 1939, 306 U. S. 292, 300.

episode in issue and rested its decision squarely on the conclusion that in fact there had been no partisanship, interference or assistance. A brief review will show the main bases for the decision.

This is not a case where "a company union" had been maintained, as in the Link-Belt Case[36] relied on in the Petition; indeed there is no claim whatever to that effect. Nor is there any claim, as in the Link-Belt Case and the Heinz Case,[37] of membership solicitation by supervisors. Nor is this a case of "failure of the employer to wipe the slate clean and announce that the employees had a free choice," as in the Link-Belt Case, or an instance where an employer, upon notice of supervisory interference, "took no step . . . to notify the employees" that such interference was unauthorized, as in the Heinz Case. On the contrary, the April 26th bulletin proclaimed throughout the properties "the right of every employee to join any union that he may wish to join and such membership will not affect his position with the Company." [38] Later the May 24th addresses made it "perfectly clear . . . that no employee will be discriminated against because of any labor affiliation he desires to make." [39] Finally, the June 24th bulletin[40] announced that:

> "Employees of Virginia Electric and Power Company have a right to self-organization, to form, join or assist labor organizations and to bargain collectively through representatives of their own choosing, and the

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[36] *Supra*, note 34.

[37] *Supra*, note 33.

[38] P. A. I, 15-16, 52; Bd. Ex. 3.

[39] P. A. I, 18-19, 58-62, 263-266, 381-382, 514-515; P. A. II, 882; Bd. Ex. 4.

[40] P. A. I, 483-484; Resp. Ex. 7; P. A. II, 993; and *supra*, note 13.

> Company has not sought and does not seek to dominate or interfere with employees in the exercise of any of their rights, individually or collectively."

As the testimony subsequently revealed, this June 24th bulletin came precisely in the middle of the I. O. E. membership campaign[41].

In all these essential qualifications, the instant case differs completely from the Heinz Case and the Link-Belt Case on which the Petition is chiefly rested. What then are the bases for the claim that the case presents a question of public importance in the administration of the Act wherein the court below has departed from rules established by this Court?

Surely not in the asserted evidence that, prior to the passage of the Act, the Company had been opposed to union affiliations, for no court has held that the Act purports to punish an antecedent state of mind as such unless followed by conduct, or at least inaction amounting to acquiescence, after the enactment of the Act. Nor does the public importance here asserted depend upon the 1936 inquiries by a minor Norfolk transportation supervisor, which are not shown to have had any effect of any nature and as to which the Petition does not ask review[42].

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[41] Solicitation of membership began about June 18th (P. A. II, 731-732, 771-772, 824-825, 848-849); and by July 2nd the I. O. E. had a majority membership (P. A. I, 23; P. A. II, 821, 878-879).

[42] Surely the Petition can not deliberately invoke consideration by this Court on the misstatement that a "full time labor spy" (Petition, p. 6) was employed by the Company. The uncontradicted evidence proves that this man was engaged to advise the Company on all matters of public concern (R. A., 16-17, 20, 26-27); only one report made by him on labor matters was ever mentioned (P. A. I, 14); he died before the events here in issue and was not replaced (B. A., 5; R. A., 2); and he is referred to by the Board only in a footnote (P. A. I, 14).

The only other circumstances which were emphasized to the court below as tending to sustain the order of the Board were (1) the tenor of the April 26th and May 24th communications, (2) the discharge of a Norfolk transportation operator, Mann, and (3) certain casual uses of Company property. Each of these claims was carefully and sympathetically reviewed by the court below:

(1) The use of Company property, the court concluded, whether by meetings, solicitation, notices or communication (Pro. 30 and 33), was, in the light of its nature, its limited extent and the specific surrounding circumstances, without any implication of "favoritism or interference" and was thus powerless to indicate that in fact free expression of view or free choice of bargaining agency "was in any wise affected thereby" (Pro. 34):

> "It is only as they tend to establish such interference that such circumstances have any significance. In many cases, of course, they are very significant; but where the limited use of Company property and facilities here shown is judged in the light of the record, we do not think that it constitutes any substantial evidence upon which a finding of interference or domination could be predicated" (Pro. 34).

The soundness of this standard can not be a matter of substantial question, for the public operation of the Act is not to be constrained in any formalistic ritual. Even if the court's careful and orderly application of that standard to the facts of the instant case were mistaken, which it is not, that would not be a departure from prior decisions of this Court, or raise any novel question calling for clarification in the public interest or have any general implication or applicability beyond the specific circumstances of the unique episode here concerned.

(2) In the court below, as in the Petition, the discharge of a conspicuously inefficient employee, Mann, for intolerable impertinence[43], was magnified into some semblance of relationship with the issue of domination, as if the Company had undertaken to scatter the ranks of its employees by striking down their brightest spirit. This colored argumentative claim was properly held by the court below to be preposterous, as being "pure speculation, unsupported by anything in the evidence" and incredible upon the record (Pro. 34). Since the Petition does not ask review on the ground of that decision, it may not properly urge review except upon the basis that that conclusion was correct. In any case the question of its correctness is purely routine, presenting no novel point and devoid of general significance in the administration of the Act.

(3) The only other major claim in the court below is that the tenor of the April 26th and May 24th communications effectively foreclosed free employee choice.

(a) Here again the court did not purport to say that subtle documents may qualify by lip service to the Act although actually shaping employee choice. The communications were not viewed in the slanting rays of any such mediæval canon. On the contrary, the words of each were realistically scrutinized in the three dimensions of their historical setting and the court concluded that "no hostility towards any outside union was manifested" (Pro. 31), that there was no indication of any "desire that the organization to be set up by the employees be not affiliated with an outside organization" (id.), but on the contrary that:

> "the employees were expressly assured that the Company was willing to bargain with them in any manner

[43] P. A. I, 391-395, 430-433; P. A. II, 912-916; Resp. Ex. 19d.

> satisfactory to the majority, that no employee would be discriminated against because of labor affiliations and that the Company was prohibited by law from dominating or interfering with the formation or administration of any labor organization or contributing financial or other support to it" (Pro. 31).

Here again, the court below meets the Board on the essential merits of the case and holds that the actual words in their actual setting fully safeguarded absolute liberty of choice, in the normal meaning of those words and without invoking any special interpretative standard as to the intentions of the Act. Even if that conclusion were erroneous, which it is not, it would constitute only an appraisal of a particular document in a unique circumstantial situation, which could not have any general potential applicability or otherwise be of any general importance in the future administration of the Act.

The decision, therefore, is, in its own words, a conclusion that "in the light of the surrounding circumstances shown by the record" (Pro. 30) and upon the basis of "the surrounding circumstances" (Pro. 31), "the facts here" (Pro. 33) and "these circumstances" and (Pro. 34) "in the light of the record" (Pro. 34),

> ". . . there is nothing to show that the employees' association does not represent the free choice of the employees, that the Company at any time dominated or in any way interfered with the employees in setting it up or that the company exercised over it any control or domination whatever" (Pro. 25).

With that as a standard, the Petition can have no quarrel. It misinterprets the opinion when asserting it to rest on a passing comment by the court that an employee impression

from prior events that the Company preferred an unaffiliated union could not constitute a violation of the Act (Pro. 31-32). The comment, in itself unassailably sound, was in no sense a premise for the court's conclusion and has moreover been intrinsically misunderstood in the Petition.

(b) The May 24th address being in fact, as the court found, neutral, the decision in that respect can present no issue of general importance. Even if that were not true, however, the only general rule that it could present would be that a disclosure of employer preference, when made under circumstances guaranteeing complete freedom of organizational choice, is not a violation of the Act. Such a rule is sound, is consistent with decisions in other circuits[44] and decisions of this Court[45] and is not contrary to any holding. As such, the point does not call for review. And even if the point, cleanly presented, were an appealing subject for consideration, nevertheless it is not so presented in this case, but at most only by strained inference and conjecture, so that the instant case would not be a satisfactory vehicle for any clarification of the law. Other cases have presented the issue in undeniable form, as in the Ford Case, where the Board did not ask for certiorari to review a

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[44] *N. L. R. B.* v. *Ford Motor Co.*, 1940, C. C. A. 6, 114 F. (2d) 905; *Jefferson Electric Co.* v. *N. L. R. B.*, 1939, C. C. A. 7, 102 F. (2d) 949; *N. L. R. B.* v. *International Shoe Co.*, 1940, C. C. A. 8, 116 F. (2d) 31; *N. L. R. B.* v. *Union Pacific Stages, Inc.*, 1938, C. C. A. 9, 99 F. (2d) 153, 178.

[45] *N. L. R. B.* v. *Express Publishing Co.*, March 3, 1941, No. 442, this Term, where a majority of the Court held that "there was no basis for any order by the Board" in employer statements that "no one can compel you to join any organization" and that, in respect of the employer's treatment of its employees, "no labor organization can force us to do these things." See also *Consolidated Edison Co.* v. *N. L. R. B.*, 1938, 305 U. S. 197, 230.

decision that explosive disclosures of employer preference were not in violation of the Act.

(c) The Circuit Court of Appeals for the Fourth Circuit is not engaged in some new design to frustrate the policies of the Act, and the individual limitations of the instant case can not be widened by reference to other decisions which the Board did not deem worthy of certiorari: *L. Greif & Bro.* v. *N. L. R. B.*, 1939, 108 F. (2d) 551, where a communication of employer preference with employee liberty was held not a violation of the Act; *N. L. R. B.* v. *Mathieson Alkali Works*, 1940, 114 F. (2d) 796, where the court, consistently with the standards later laid down in the Heinz Case, held that an employer may be liable for unauthorized conduct of minor supervisors "if the surrounding circumstances are such as reasonably to justify the inference that it is an expression of the employer's policy or is approved by the employer," but not if the statement of a minor supervisor "appears to be nothing more than an expression of ideas of his own, contrary to the neutral policy assumed by the employer" (803); and *E. I. du Pont de Nemours & Co.* v. *N. L. R. B.*, 1940, 116 F. (2d) 388, where the court held that a disestablishment of an admitted "company union" was complete where proclaimed by a statement of company policy "to comply in the fullest sense with this Act," quoting the Act and adding that "there will be no discrimination, interference, restraint or coercion by the Company or any of its representatives against any employee because of membership or non-membership in any labor union." While those decisions appear sound in themselves, they involve differing facts and issues, show no single plan to enervate the Act and certainly communicate no gregarious importance to the solitary limitations of the case at bar. The court below has been alert to sustain orders of the Board wherever possible upon the record presented: *e. g.*, *N. L. R. B.* v.

American Oil Co., Inc., 1940, 114 F. (2d) 1009, enforcing 14 N. L. R. B. 990; *N. L. R. B.* v. *Highland Park Mfg. Co.*, 1940, 110 F. (2d) 632, enforcing 12 N. L. R. B. 1238; *Virginia Ferry Corp. v. N. L. R. B.*, 1939, 101 F. (2d) 103, enforcing 8 N. L. R. B. 770; *N. L. R. B.* v. *J. Freezer & Son, Inc.*, 1938, 95 F. (2d) 840, enforcing 3 N. L. R. B. 120.

(d) In summary, therefore, the cited cases are inapposite and the only conceivable general rule from the decision below, while in itself sound and consistent with all existing decisions, was not actually presented and the court below expressly so concluded. To assert, as the Petition does, that the decision gives some special passport to subtlety, although illegalizing frankness, is contradicted by the text of the opinion. Not only indeed by the text of the opinion but by the record of the court itself, which is known to put substance above form and actuality above costume, whether that rule in particular cases may work for or against the wishes of any particular litigant.

2. The Point of Interference Is Plainly Ineligible For Review

On the issue of interference, the Petition asks review only on the question whether "anti-union threats and surveillance of union meetings" by one minor supervisory employee in the Norfolk transportation department can support, in the circumstances of the instant case, a cease and desist order.

This is plainly a make-weight. This Honorable Court has clearly declared in the Machinists' Case,[46], the Heinz Case,[47]

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[46] *International Association of Machinists* v. *N. L. R. B.*, 1940, 311 U. S. 72.

[47] *Supra*, note 33.

and the Link-Belt Case[48] that actual authorization or approval is not a condition precedent to an order to prevent repetition of supervisory interference where the employer has failed to communicate its claimed neutrality to the employees or, with knowledge of supervisory interference, failed to repudiate it to the employees. The rule is thus now clear and had indeed been already recognized by the court below before those decisions (*N. L. R. B.* v. *Mathieson Alkali Works*, 1940, 114 F. (2d), 796, 799, 802-3). The decision here is manifestly consistent with that rule. Such action by one isolated man, of negligible authority, in a system of 3,500 employees, which was never brought to the Company's attention until after the filing of the complaint,[49] which was directly contrary to the shortly preceding executive bulletin of April 26th, the nearly contemporaneous executive address of May 24th and the later executive bulletin of June 24th, which was not shown to have had any actual effect of any kind on any employee and which was affirmatively shown to have had no effect on those employees who testified concerning it,[50] could not be deemed significant. And if it could, upon debate, the general administration of the Act would hardly be disturbed by the adjudication.

3. The Point of Reimbursing Checked-off Dues Is Not Presented

Here the Petition asks review on the ground that it is of public importance to determine whether, upon a disestab-

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[48] *Supra*, note 34.

[49] P. A. I, 269, 370, 447, 455, 460, 463-465 and 502. The 3,500 figure includes supervisory employees.

[50] P. A. I, 167-169, 180-181.

lishment order, the Board may require an employer to refund all dues theretofore checked off and paid to the delinquent union.

The Board's sense of the magnitude of this issue comes newly for it has failed to ask certiorari for any of the numerous decisions adverse to it on this point[51] and in another recent case consented to the elimination of such a provision from its order which was in other respects enforced.[52]

But whether or not the point is one of public concern, it is not suitably presented in this case. The court below did not decide that question or conceive (Pro. 24) that the question was presented for decision. In fact, due to the court's disposition of the other issues, the question was not presented for decision. The court below, moreover, has not in any case held that the Board is without authority to include such a provision in an order otherwise within its power.

In any event, the point is squarely presented in another case, in which the time for requesting certiorari has not expired (*A. E. Staley Mfg. Co.* v. *N. L. R. B.*, *supra*, note 51).

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[51] See Petition, pp. 27-28; and: *C. C. A. 2, Western Union Telegraph Co.* v. *N. L. R. B.*, August 9, 1940, 113 F. (2d) 992, 997-998; *C. C. A. 6, N. L. R. B.* v. *West Kentucky Coal Co.*, November 15, 1940, 116 F. (2d) 816; *C. C. A. 7, A. E. Staley Mfg. Co.* v. *N. L. R. B.*, January 30, 1941, opinion on proposed decree, C. C. H. Labor Law Service, Par. 60,277, in conformity with opinion of November 14, 1940, C. C. H. Labor Law Service, Par. 60,135; *C. C. A. 7, N. L. R. B.* v. *Greenebaum Tanning Co.*, March 22, 1940, 110 F. (2d) 984, 988-989, cert. den., No. 152, this Term (on petition by company); *C. C. A. 8, Kansas City Power & Light Co.* v. *N. L. R. B.*, April 25, 1940, 111 F. (2d) 340, 348.

[52] *N. L. R. B.* v. *Hughes Tool Co.*, C. C. A. 5, Nov. 26, 1940, unreported, enforcing 27 N. L. R. B., No. 145.

Conclusion

The Petition presents no matter of novelty or importance in the administration of the Act; the decision below does not conflict with prior decisions of this Court or other decisions in other circuits. The Petition should be denied.

Respectfully submitted,

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